

A Junaidi bin Abdullah v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-38
OF 1989

B JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND PEH SWEE CHIN
SCJJ
21 JULY 1993

C *Criminal Procedure* — Trial — Charge of unlawful possession of firearm under
s 57(1)(a) of the Internal Security Act 1960 — Close of prosecution's case — Whether
prima facie case established by prosecution — Whether court had to consider acquittal —
Criminal Procedure Code (FMS Cap 6) ss 173(f) & 180 — Internal Security Act 1960
s 57(1)(a)

Criminal Procedure — Trial — Close of prosecution's case — Duty of court —
Whether mandatory for judge to record reasons for calling accused to enter defence —
D Criminal Procedure Code (FMS Cap 6) s 180

Evidence — Criminal law — Character of accused — Whether prejudicial evidence of
accused's bad character admissible although not objected to by counsel — Whether principles
governing admissibility of similar fact evidence applicable to character evidence — Whether
admissible on ground of relevancy and necessity to rebut defence — Evidence Act 1950
ss 11 & 15

E *Evidence* — Expert witness — Whether government chemist competent to give evidence
of serviceability of firearm — Test to be applied in determining whether witness was expert
witness — Whether witness's lack of knowledge and experience affected admissibility or
weight of evidence — Evidence Act 1950 s 45

F The appellant was convicted for possession of a firearm under s 57(1)(a)
of the Internal Security Act 1960 ('the Act') and was sentenced to
death. The appellant appealed on the grounds that: (a) the trial judge
was wrong in law in not examining the evidence at the close of the
prosecution's case to determine whether a prima facie case had been
established by the prosecution and to record his reasons for so finding;
G (b) the trial judge was wrong in admitting prejudicial and inadmissible
bad character evidence although no objection had been raised by the
defence counsel; and (c) that the government chemist was not
competent to give evidence of the serviceability of the revolver as an
expert witness.

H **Held**, dismissing the appeal:

I (1) By calling an accused to enter his defence, the trial judge must on
evaluation of the evidence, have been satisfied that the prosecution
had, at the close of the prosecution's case, established a prima
facie case which, if unrebutted, would warrant a conviction of the
accused. To arrive at such a conclusion, the judge must consider
all the evidence adduced by the prosecution as tested in cross-
examination, on a prima facie basis. In this appeal, the
establishment of a prima facie case of unlawful possession of a

firearm under s 57 of the Act was so obvious that it became academic and unnecessary for the court to consider an order of acquittal under s 180 of the Criminal Procedure Code (FMS Cap 6) ('the Code').

- (2) There is no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter on his defence or to state his findings on the credibility of the main prosecution witnesses. Where there was a particular reason for doing so, such as where a submission of no case to answer had been made in a complex case or where the accused was called to enter on his defence on a lesser or alternative charge, judges sometimes gave their reasons. In uncomplicated cases such as the present, it was not obligatory or necessary to do so. Thus, when the learned judge called for the defence in the present case, it was not mandatory for him to record the reasons. Mere failure or omission on the part of a trial judge to record his grounds for his findings on credibility of witnesses at that stage of the trial was not sufficient by itself for allowing an appeal.
- (3) Notwithstanding the concession made by the defence counsel at the trial that there was a case to answer, it was still open and indeed incumbent upon the court at the appellate stage to examine the appeal record to be satisfied that there was in fact and in law a case for the appellant to answer.
- (4) Where the purpose of adducing evidence of similar facts or similar offences was justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise have been open to the accused (in addition to those under ss 14 and 15 of the Evidence Act 1950), evidence of bad character was admissible in evidence, provided that the probative value of such evidence outweighed its prejudicial effect. There must be a real anticipated defence to be rebutted and not merely crediting the accused with a fancy defence. Here, the evidence of the physical possession of the revolver by another person during the earlier robbery was vital to the defence and relevant under s 11 of the Evidence Act 1950 to cast a reasonable doubt on the prosecution case that the accused was in possession of the revolver at the time of the arrest. Therefore, the prosecution was entitled to adduce evidence to rebut such a defence.
- (5) The test to be applied for s 45 of the Evidence Act 1950 is whether the nature of the evidence required special skill; and whether the witness had acquired the necessary skill so that he had adequate knowledge to express an opinion on the matter under inquiry. Since the evidence sought to be proved by the prosecution was limited only to the serviceability of an ordinary revolver, the chemist in the chemistry department of the government was competent to give expert evidence of such an uncomplicated matter. It was for the trial judge himself, as both judge of fact and law, to determine the weight of such evidence.

A [Bahasa Malaysia summary]

Perayu telah disabit kerana memiliki senjata api di bawah s 57(1)(a) Akta Keselamatan Dalam Negeri 1960 ('Akta itu') dan telah dihukum mati. Perayu telah membuat rayuan atas alasan-alasan bahawa: (a) hakim perbicaraan telah membuat kesilapan dari segi undang-undang kerana tidak memeriksa keterangan pada penghujung kes pihak pendakwa untuk menentukan sama ada kes prima facie telah dibuktikan oleh pihak pendakwa dan mencatatkan sebab-sebab untuk pendapatnya itu; (b) hakim perbicaraan telah membuat kesilapan kerana menerima keterangan watak buruk perayu yang memudaratkan dan seharusnya tidak boleh diterima, walaupun tidak ada bantahan dibuat oleh peguambela; dan (c) ahli kimia kerajaan tidak layak memberi keterangan mengenai kebolegunaan revolver itu sebagai seorang saksi pakar.

Diputuskan, menolak rayuan itu:

- D** (1) Dengan memanggil perayu untuk memasukkan pembelaannya, hakim perbicaraan, selepas meneliti keterangan, mesti berpuas hati bahawa pihak pendakwa, pada penghujung kesnya, telah berjaya menunjukkan suatu kes prima facie yang, jika tidak dipatahkan, akan mewajarkan sabitan tertuduh. Untuk membuat suatu keputusan seperti itu, hakim mestilah mempertimbangkan keseluruhan keterangan yang dikemukakan oleh pihak pendakwa yang telah diuji semasa pemeriksaan balas, atas dasar prima facie. Di dalam rayuan ini, kes prima facie pemilikan senjata api secara haram di bawah s 57 Akta itu telah dibuktikan dengan begitu jelas sehingga menjadi akademik dan tidak perlu untuk mahkamah mempertimbangkan sama ada perintah pembebasan patut dibuat di bawah s 180 Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu').
- E** (2) Tidak ada peruntukan statutori yang mewajarkan seorang hakim yang bersidang seorang diri untuk mencatatkan dengan nyata alasannya sebelum memanggil tertuduh membela dirinya atau menyebut pendapatnya mengenai kebolehpercayaan saksi-saksi utama pihak pendakwa. Dalam keadaan di mana terdapat sebab-sebab tertentu untuk menyatakan alasannya, seperti apabila penghujahan tidak terdapat kes untuk dijawab dikemukakan di dalam kes yang rumit atau apabila tertuduh diminta membuat pembelaan atas tuduhan lebih ringan atau alternatif, hakim adakalanya memberi alasan. Di dalam kes-kes yang tidak rumit, seperti kes ini, adalah tidak wajib atau perlu berbuat demikian. Kegagalan atau peninggalan hakim perbicaraan untuk merekodkan alasan keputusannya tentang kebolehpercayaan saksi-saksi pada peringkat perbicaraan itu tidak mencukupi dengan sendirinya untuk membenarkan rayuan itu.
- F**
- G**
- H**
- I** (3) Meskipun peguambela telah mengaku di perbicaraan bahawa terdapat kes untuk dijawab, mahkamah masih boleh dan wajib, di peringkat rayuan, memeriksa rekod rayuan supaya berpuas hati bahawa terdapat kes untuk dijawab oleh perayu dari segi fakta dan undang-undang.

- (4) Apabila tujuan mengemukakan keterangan fakta serupa atau kesalahan serupa dapat dipertahankan atas alasan kerelevanan atau keperluan untuk mematahkan sebarang pembelaan yang boleh digunakan oleh tertuduh (termasuk sebab-sebab di bawah ss 14 dan 15 Akta Keterangan 1950), keterangan watak buruk boleh diterima selagi nilai kejujuran keterangan itu melebihi kesan kemudaratanannya. Mestilah terdapat sesuatu pembelaan sebenar yang hendak dipatahkan dan bukan setakat menyatakan bahawa tertuduh membawa pembelaan angan-angan sahaja. Di dalam kes ini, keterangan pemilikan fizikal revolver itu oleh seorang yang lain semasa rompakkan yang lebih awal adalah sangat penting bagi pembelaan dan relevan di bawah s 11 Akta Keterangan 1950 untuk menimbulkan keraguan yang munasabah mengenai kes pendakwa bahawa si tertuduh memiliki revolver itu pada masa beliau ditangkap. Oleh itu, pihak pendakwa berhak mengemukakan keterangan untuk mematahkan pembelaan itu.
- (5) Ujian yang perlu digunakan untuk s 45 Akta Keterangan 1950 adalah sama ada sifat keterangan itu memerlukan kepakaran tertentu; dan sama ada saksi itu mempunyai pengetahuan yang mencukupi untuk memberi pendapat mengenai perkara yang disiasati. Oleh kerana keterangan yang hendak dibuktikan oleh pihak pendakwa hanya terhad kepada soalan sama ada revolver itu boleh digunakan, pegawai kimia di jabatan kimia kerajaan layak memberi keterangan pakar mengenai perkara yang tidak rumit itu. Terpulanglah kepada hakim perbicaraan, sebagai hakim fakta dan undang-undang, untuk menentukan kepentingan keterangan itu.]

Notes

For notes on procedure at the close of the prosecution's case, see 5 *Mallal's Digest* (4th Ed), paras 2551, 2577-2590, 2619, 2748-2749, 2760-2761.

For notes on character evidence, see 7 *Mallal's Digest* (4th Ed) paras 275-289.

Cases referred to

- 1 *Haw Tua Tau v PP* [1981] 2 MLJ 49 (folld)
- 2 *Munusamy v PP* [1987] 1 MLJ 492 (folld)
- 3 *PP v Chin Yoke* [1940] MLJ 47 (folld)
- 4 *Yap Chai Chai & Anor v PP* [1973] 1 MLJ 219 (folld)
- 5 *PP v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 (refd)
- 6 *Makin v AG for New South Wales* [1894] AC 57 (folld)
- 7 *PP v Ong Kok Tan* [1969] 1 MLJ 118 (refd)
- 8 *GFL Ewin v PP* [1949] MLJ 279 (refd)
- 9 *Noor Mohamed v R* [1949] AC 182; [1949] 1 All ER 365 (refd)
- 10 *R v Straffen* [1952] 2 All ER 657; [1952] 2 QB 911 (refd)
- 11 *R v Horwood* [1969] 3 All ER 1156; [1970] 1 QB 133; [1969] 3 WLR 964 (refd)

- A 12 *Boardman v DPP* [1974] 3 All ER 887; [1975] AC 421; [1974] 3 WLR 673 (folld)
13 *PP v Veeran Kutty & Anor* [1990] 3 MLJ 498 (refd)
14 *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 (refd)
15 *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 (distsd)
B 16 *PP v Muhamed bin Sulaiman* [1982] 2 MLJ 320 (distsd)
17 *PP v Virammal* AIR 1923 Mad 178 (refd)

Appeal from: Criminal Trial No 24/84 (High Court, Johor Bahru)

- C *Karpal Singh* (*Karpal Singh & Co*) for the appellant.
Suriyadi bin Halim Omar (Deputy Public Prosecutor) for the public prosecutor.

Mohamed Azmi SCJ (delivering the grounds of judgment of the court):
The appellant was convicted for possession of a firearm under s 57(1)(a) of the Internal Security Act 1960 ('the Act') and sentenced to death by the High Court at Johor Bahru.

The charge was on the following terms:

- E That you, on 10 April 1984 at about 5.10am, in the vicinity of an unnumbered house in Kampong Maju Jaya, Pekan Nenas, in the District of Pontian, in the State of Johor, within a security area as proclaimed by the Yang di-Pertuan Agong (vide Proclamation PU(A) 148 of 1969 dated 15 May 1969), without lawful excuse, did have in your possession a firearm, to wit, a revolver Colt 0.38 Special, serial number 811073, without lawful authority and that you thereby committed an offence under s 57(1)(a) of the Internal Security Act 1960 and punishable under s 57 of the same Act.

- F The case for the prosecution could be summarized as follows. At about 4am on 10 April 1984, a suspect by the name of Tajuddin bin Zainon (PW2), whilst in police custody, led a police party to Kampong Maju Jaya, Pekan Nenas, Pontian, to affect the arrest of four persons in connection with an armed robbery committed in the vicinity. At an unnumbered plank house,
G Tajuddin called out the name 'Jaafar' and at the same time, a police officer knocked on the plank wall. Suddenly, a human figure jumped out of a window and ran out of the house. PC Ismail (PW3) and DPC Zainuddin (now deceased), gave chase and were successful in arresting the fleeing figure, who was identified as the appellant. From the right hand of the appellant, the police recovered the subject matter of the charge, a revolver
H (exh P3), loaded with five rounds of ammunition. In the course of the police investigation, the revolver was sent to the chemistry department to determine its serviceability. Test firing was conducted by Mr Cheong Meow Koon (PW6), who testified in court as an expert witness that the firearm was serviceable. At the close of the case for the prosecution, Encik Yacob Atan, counsel assigned as defence counsel in the court below,
I indicated to the learned trial judge that he did not wish to make any submission for an order of acquittal at that stage, as he conceded that there was a prima facie case to answer. His actual words were: 'I concede there is a case and do not wish to submit.'

At counsel's request, the trial was adjourned to the next day, and at the resumption of hearing, the appellant was called to enter his defence. The appellant had no witness, but he elected to give evidence on oath. In his defence, he testified that he was empty-handed at the relevant time of his arrest and therefore was not in possession of the revolver as alleged in the charge. To support his story, he said he knew that a person named Salleh was almost all the time handling the revolver and, as such, the police could not possibly have found it in his right hand on the morning in question. After considering the defence, the learned trial judge found the appellant guilty as charged and passed the mandatory death sentence.

In his seven-page grounds of judgment, the learned judge was clearly of the opinion that the defence had not raised any reasonable doubt in the prosecution's case, and he concluded by stating:

After considering all the evidence presented by the prosecution and the defence as a whole, I found the accused guilty as charged. I then convicted him and passed the mandatory death sentence.

Mr Karpal Singh, who argued the appeal before us, had three major complaints against the conviction of the appellant. It is convenient to dispose of first, the question of whether the appellant ought to have been acquitted at the close of the case for the prosecution, which the court was empowered to order under s 180 of Criminal Procedure Code (FMS Cap 6) ('the Code'). It was argued that the learned trial judge was wrong in law in not examining the evidence at the close of the prosecution's case to determine whether a prima facie case had been established by the prosecution. On the evidence presented by the prosecution, we did not really understand why there should be any doubt as to the propriety of the order to call for the defence. The principle to be applied at the close of the case for the prosecution in a jury trial as laid down by the Privy Council in *Haw Tua Tau v PP*,¹ had been considered by this court in *Munusamy v PP*,² at p 496. The unanimous opinion of the Supreme Court in *Munusamy*² was that in so far as a trial before a single judge was concerned, *Haw Tua Tau*¹ did not exclude or disapprove of the application of the long-established prima facie case principle at the close of the prosecution case, as envisaged in ss 173 (f) and 180 of the Code. There was no conflict in substance between the principle established in *Haw Tua Tau*¹ and the principle consistently followed in this country since 1940 as laid down in *PP v Chin Yoke*.³ On the evidence adduced by the six prosecution witnesses in the instant appeal, this was clearly not a case where it could be said that there was no evidence at all to prove one or more of the essential ingredients of the offence under s 57(1)(a) of the Act. The only apparent omission here was the fact that before making the order calling for the defence, neither in the notes of evidence nor in his grounds of judgment, did the learned judge expressly record why he was satisfied that there was a prima facie case to answer, or why, in his opinion, the prosecution had established a prima facie case which, if unrebutted, would warrant a conviction.

In *Yap Chai Chai & Anor v PP*,⁴ in an appeal to the then Federal Court against conviction on a murder charge, it was argued that it was mandatory for the trial judge, at the close of the prosecution's case, to enter on the

- A record, his opinion that there was a case to answer and that his failure to do so rendered the trial a nullity. In dismissing the appeal, Ong CJ said at p 221:

- B Leaving aside for the moment the second appellant's statement, we are clearly of opinion that the facts which were indisputable had established a clear prima facie case, and that the learned trial judge would have been wrong to withdraw the case at that stage from the jury. We do not think that the provisions of s 204(2) of the Criminal Procedure Code (SS Cap 21) had any application, nor do we agree with the contention of Datuk SP Seenivasagam that it was mandatory for the judge at the close of the prosecution to enter on the record his opinion that there was a case to answer — the failure to do so rendering the trial a nullity. As
- C authority for this proposition two cases were cited to us, being the judgments delivered by Willan CJ in *Ng Peng Choon v PP* [1947] MLJ 87 and *Govindasamy v PP* [1949] MLJ 101. In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal
- D justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual.

- In our opinion, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for
- E doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as in the instant appeal, it is not obligatory or even necessary to do so. By calling an accused to enter his defence, it should be assumed that
- F the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a
- G prima facie basis. In this appeal, the establishment of a prima facie case of unlawful possession of a firearm under s 57 of the Act was so obvious, even to the defence counsel, that it became academic and unnecessary for the court to consider an order of acquittal under s 180 of the Code. Thus, when the learned judge called for the defence in the present case, he must have been satisfied that there was a prima facie case to answer which, if unrebutted,
- H would warrant a conviction, and it was not mandatory for him to record the reasons for his satisfaction, even if there had been no concession made by the defence counsel. However, whether the judge was actually correct in law in calling for the defence was of course open for review on appeal to this court. Be that as it may, we hold the view that mere failure or omission on
- I the part of a trial judge to record his grounds for his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss 60 and 72 of the Courts of Judicature Act 1964 read together with s 167 of Evidence Act 1950 and s 422 of the Code.

We must however, stress that notwithstanding the concession made by the defence counsel at the trial, it was still open and indeed incumbent upon us, at this appellate stage, to examine the appeal record and to satisfy ourselves that there was in fact and in law, a case for the appellant to answer. Having done so, we were of the view that the evidence adduced by the prosecution as contained in the appeal record did in fact and in law disclose a *prima facie* case for the accused to answer the charge which if un rebutted would warrant a conviction.

The suggestion of Mr Karpal Singh that the trial judge had automatically called for the defence on account of reg 13 of the Essential (Security Cases) Regulations 1975, contrary to the principle enunciated in *PP v Sihabudin*,⁵ was based on pure conjecture and as such, it must be rejected.

From the appeal record, we were satisfied that the appellant was not entitled to an acquittal at the close of the case for the prosecution under s 180 of the Code. Accordingly this particular ground of appeal failed.

The second argument advanced by Mr Karpal Singh was that the learned trial judge was wrong in admitting prejudicial and inadmissible bad character evidence through Tajuddin (PW2), although no objection had been raised by the defence counsel. The evidence of Tajuddin that was objected to was as follows: '... I saw him handling a firearm at night in the course of a robbery. The robbery took place at the 33rd milestone, Jalan Pontian ...'.

The defence in this case was a complete denial by the appellant of being in physical possession of the revolver as alleged. Although the appellant did not challenge the fact of his arrest, he denied that the revolver was found in his right hand at the material time. It was his contention that the said firearm was all along in the possession of a person named Salleh. As it was entitled and indeed under a duty to do, the defence had, at an early stage of the trial, put this vital part of the defence in the cross-examination of the first and second prosecution witnesses, namely DSP Mustaffa Kamil (PW1), and Tajuddin (PW2), the suspect who had led the police party to the scene of arrest. The total effect of this particular aspect of the cross-examination was to put to the prosecution witness that this particular revolver (exh P3) was at all material times in the possession of Salleh, an armed robber operating in the company of the appellant and two others (Jaafar and Othman) and, as such, the defence sought to prove that the revolver could not have been in the appellant's possession at the time of his arrest. The fact of the armed robbery that took place prior to his arrest formed an essential part of the appellant's defence to establish that the recovery by the police of the revolver from his right hand on the early morning of 10 April 1984 was a mere fabrication. He explained that the only time on that day when he had come to be in physical possession of the firearm was when he was asked by Salleh to hold it for him momentarily during a pillion ride, to enable Salleh to manage the motor cycle on which they were riding. He had however, returned the revolver to Salleh after the motorcycle ride, and did not know what had happened to it after that. According to the appellant, after his arrest, he was led by the police to a spot about ten yards away, where the revolver had been planted, and that was where the police had actually recovered it. At the close of the defence, the learned judge did not

- A find the appellant a credible witness, and having considered the totality of the evidence, he found the appellant guilty as charged.

Since the evidence of the armed robbery was an integral part of the defence, it would not be in the interest of justice to exclude it on ground of bad evidence. It was a relevant and indeed necessary piece of evidence for the purpose of establishing that it was Salleh and not the appellant, who was armed with a revolver, and as such it was unlikely for the appellant to be in possession of the firearm shortly afterwards at the material time of his arrest. The armed gang robbery was a material fact in issue as far as the defence was concerned, for the purpose of creating a reasonable doubt in the prosecution case on the issue of possession of the firearm. Since this line of defence had already been indicated during cross-examination of DSP Mustaffa Kamil (PW1), we were of the view that the evidence of Tajuddin (PW2) on the armed robbery in which the appellant was involved, was admissible in evidence to rebut that defence, on the principle enunciated in *Makin v AG for New South Wales*,⁶ where at p 65 the Privy Council speaking through Lord Herschell LC laid down the following principle on the admissibility of evidence of similar facts:

In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

- G The dictum of the Lord Chancellor was considered and applied locally in *PP v Ong Kok Tan*,⁷ at p 120, in connection with s 15 of the Evidence Act 1950. Much earlier, Willan CJ in the case of *GFL Ewin v PP*⁸ at p 281, had conveniently divided the said principle into two distinct parts:

- (a) It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried; and
- (b) ... the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

In *Ewin's* case,⁸ in considering the question of admissibility of evidence of similar offences of shooting by the appellant of the headman of a Chinese

tin mine not long prior to the shooting of the child, the subject matter of the murder with which he was charged, the appellate court at p 282 required the prosecution to justify the admission of such evidence on the basis of the principles in *Makin's* case,⁶ rather than on the principle of *res gestae*.

The principles laid down in *Makin's* case⁶ were further stressed by the Privy Council in *Noor Mohamed v R*⁹ and applied by the Court of Appeal in *R v Straffen*,¹⁰ and *R v Horwood*,¹¹ and by the House of Lords in *Boardman v DPP*.¹² In *Boardman's* case,¹² Lord Morris had this to say at pp 892–893:

The line separating exclusion and admission will often, as Lord Herschell LC said, be difficult to draw. In some cases a ruling will be sought from a judge at the time when certain evidence is tendered. The judge will then have to decide whether a particular piece of evidence is on the one side or the other and whether, in the words of Viscount Simon in *Harris v DPP* [1952] 1 All ER 1044 at p 1047, the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted. But at whatever stage a judge gives a ruling he must exercise his judgment and his discretion having in mind both the requirements of fairness and also the requirements of justice. The first limb of what was said by Lord Herschell LC in *Makin's* case was said by Viscount Sankey LC in *Maxwell v DPP* [1935] AC 309 at p 317 to express 'one of the most deeply rooted and jealously guarded principles of our criminal law'. Judges can be trusted not to allow so fundamental a principle to be eroded. On the other hand, there are occasions and situations in which in the interests of justice certain evidence should be tendered and is admissible in spite of the fact that it may or will tend to show guilt in the accused of some offence other than that with which he is charged. In the second limb of what he said in *Makin's* case Lord Herschell LC gave certain examples. In his speech in *Harris v DPP*, Viscount Simon pointed out that it would be an error to attempt to draw up a closed list of the sorts of cases in which the principle operates. Just as a closed list need not be contemplated so also, where what is important is the application of principle, the use of labels or definitive descriptions cannot be either comprehensive or restrictive. While there may be many reasons why what is called 'similar fact' evidence is admissible there are some cases where words used by Hallett J are apt. In *R v Robinson* (1953) 37 Cr App Rep 95 at p 106, he said:

'If a jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense.'

But as Viscount Simon pointed out in *Harris v DPP* evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt; so evidence of 'similar facts' should be excluded unless such evidence has a really material bearing on the issues to be decided. I think that it follows from this that, to be admissible, evidence must be related to something more than isolated instances of the same kind of offence.

On the principle laid down in *Makin's* case⁶ and *Boardman's* case,¹² we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise be open to the accused (in addition to those under ss 14 and 15 of the Evidence Act 1950), it is

A admissible in evidence provided the probative value of such evidence outweighs its prejudicial value. There must be a real anticipated defence to be rebutted and not merely 'crediting the accused with a fancy defence' as emphasized by the Privy Council in *Noor Mohamed v R*⁹ at p 192.

B In the present case, the moment DSP Mustaffa Kamil (PW1) was cross-examined by the defence counsel on the person who, according to Tajuddin, had the firearm, it was a reasonable indication by the defence to the prosecution that the appellant's defence would be one of complete denial of possession of the revolver by showing that he was unarmed and that it was Salleh who physically had the revolver. As such, the prosecution was entitled to adduce evidence through Tajuddin (PW2) to rebut such defence.

C Indeed, as alluded to earlier, the evidence of physical possession of the revolver during the robbery was vital to the defence and relevant under s 11 of the Evidence Act 1950 to cast a reasonable doubt on the prosecution's case that the accused was in possession of the revolver at the time of his arrest, and thereby tilt the balance in the appellant's favour (if such evidence was accepted as probable) that the revolver could not have been in his right hand at the time of his arrest. Since the evidence of the armed robbery formed a vital part of the defence, it was difficult not to agree in the circumstances of this case that the probative value of such evidence would outweigh its prejudicial value as evidence of bad character. To exclude such evidence in the trial would be against the interest of justice, as it virtually meant denying the accused the opportunity of testing his defence in the cross-examination of prosecution's witnesses. It would also deny the prosecution the opportunity to rebut a defence which would otherwise be open to the accused. In our view, that was why the defence counsel at the trial had intentionally introduced the evidence of similar facts, and cross-examined Tajuddin extensively on the armed robbery, instead of avoiding it altogether as evidence of bad character. Unfortunately for the appellant, the testimony of Tajuddin did not come up to the expectation of the defence.

F In *PP v Veeran Kutty & Anor*,¹³ a case involving a somewhat reverse situation, Peh Swee Chin J (as he then was) expressed his regrets at p 504 for not being referred to *Boardman's* case,¹² in the following words:

H The net result is that, if the *Boardman* case had been cited to me or otherwise brought to my attention, I would have ruled that the evidence of armed robbery would have been admissible as the prejudicial effect of such evidence would have been overridden by the striking similarity of the evidence in question, for reason different from learned defence counsel's. I do hold that the evidence of the armed robbery was admissible as contended by learned defence counsel and that the *Boardman* case is applicable in our courts as it has merely modified the ratio in the *Makin* case, the latter case having been relied on and accepted in our courts for a long time [please see, eg *PP v Ong Kok Tan*⁷] and the reasoning of the learned Law Lords in *Boardman* has impeccable logic.

I We are of the view that just as disputed hearsay evidence does not become admissible by reason of a failure to object (see *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation*¹⁴ at p 127), admissible evidence of similar facts does not become inadmissible by reason of describing

it wrongly. Thus, although the learned trial judge had somewhat inaccurately classified the evidence objected to as *res gestae* instead of evidence of similar facts, we were of the view that such misdescription did not affect its admissibility. In the circumstances, this ground of appeal must also be rejected. A

The last ground of appeal that merited our consideration related to the admissibility of the evidence of the government chemist, Mr Cheong Meow Kioon (PW6). It concerned the competency of Mr Cheong to give evidence on the serviceability of the revolver as an expert witness under s 45 of the Evidence Act 1950. Mr Karpal Singh seemed to suggest that only an armourer could give evidence on the serviceability of firearms. He cited the judgment of Hashim Yeop Sani J in *Dato Mokhtar bin Hashim & Anor v PP*¹⁵ in the High Court where at p 255 the learned judge had applied the same test as Suffian LP in *PP v Muhamed bin Sulaiman*¹⁶ on the admissibility of the opinion of witnesses possessing particular skills. B C

It must be stressed at the outset that unlike the appeal before us, both authorities cited had reference to a charge of murder but, like it, the expert witness was not an armourer but a chemist. Further, the evidence sought to be adduced by the chemist in those cases was of a complex and scientific nature, which was whether or not a particular bullet which had killed the deceased had been fired through the barrel of a particular firearm which belonged to the accused. In both cases, the chemist was held to be a competent witness to express a forensic opinion in the matter, although in *Muhamed bin Sulaiman*'s case,¹⁶ the chemist had no academic training in forensic ballistics. At p 323, Suffian LP said: D E

The only question was, is Mr Lum peritus, is he skilled, is he skilled in determining whether a particular bullet has gone through the barrel of a particular rifle. He need not become so skilled in any particular way nor by special study nor professionally. It is enough if he has had sufficient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge. F

In *Dato Mokhtar bin Hashim*'s case,¹⁵ Hashim Yeop A Sani J echoed the same principle when he said at p 255:

... To qualify to give such evidence the witness must satisfy the court that he is indeed an expert, that he is specially skilled in the field of the enquiry carried out by him. An expert is one who is skilled in any particular art, trade or profession being possessed of peculiar knowledge concerning the same. The witness must have made a special study of the subject or have acquired special experience on the subject. A similar question arose in the case of *R v Silverlock* [1894] 2 QB 766 where handwriting was in issue, and of the person to give expert evidence Lord Russel of Killowen CJ said 'Is he peritus? Is he skilled? Has he an adequate knowledge?' G H

The distinction between the present appeal and those two authorities on which Mr Karpal Singh had placed heavy reliance was obvious. The expert evidence of the chemist given in the instant case was limited to the serviceability of the revolver, whereas in the two authorities cited, the chemist went beyond mere test-firing to determine serviceability, but gave evidence on the science of forensic ballistics to conclude an opinion that a I

- A particular bullet had gone through the barrel of a firearm belonging to the accused; which would accordingly connect the accused with the crime of murder.

In *Muhammed bin Sulaiman's* case,¹⁶ the Federal Court comprising of Suffian LP, Wan Sulaiman FJ and Abdul Hamid FJ ruled at p 322 that although Mr Lum, the chemist, admitted that he had no academic training in forensic ballistics, his education, scientific qualification and practical experience gained in the department of chemistry and 'especially considering that Mr Lum had not been shaken in cross-examination', was sufficient for the court to conclude that he had adequate knowledge on the matter, and that the trial judge 'should have treated the evidence as admissible and left the question of its weight to the jury'. Although in *Dato Mokhtar bin Hashim's* case,¹⁵ the murder charge was conducted in a security trial, Hashim Yeop A Sani J followed and adopted the same test as was applied in *Muhammed bin Sulaiman*.¹⁶ The two authorities relied upon by Mr Karpal Singh did not therefore, support his contention that only an armourer could give expert evidence on the serviceability of a revolver. If a chemist was competent to give expert evidence on the science of forensic ballistics, there could be no conceivable reason why a chemist like Mr Cheong Meow Kioon could not equally be accepted as an expert on mere serviceability of an ordinary revolver.

In our view, the test to be applied for the purpose of s 45 of the Evidence Act 1950 is this. First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The speciality of the skill required of an expert witness under s 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the court be required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or the lack of it) of the expert. To use the words of Suffian LP at p 323 in *Muhammed bin Sulaiman*¹⁶ when he applied the case of *PP v Virammal*,¹⁷ the jurors themselves, 'could have used a magnifying glass, or their own eyes and their own mind to the evidence and [verify] the results submitted to them' by the expert witness. The lack of qualification or experience on the part of the expert must necessarily affect the weight of the evidence rather than admissibility. But where the evidence is of a complex and scientific nature, the absence of both qualification or experience can certainly affect admissibility. No hard and fast rule should be laid down on the issue of the competency of an expert witness. In an uncomplicated matter, considerable laxity must however be applied in practice (see the judgment of Abdoolcader FJ in *Dato Mokhtar bin Hashim's* case¹⁵ at p 278). As stated by this court in *Munusamy v PP*² at p 496:

As a rule, a chemist in drug cases does not give any opinion as to ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine their identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting, trade mark, copyright or ballistic experts. Without being derogatory it is common knowledge that even animals, such as snuff dogs when sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion.

We were therefore of the opinion that since the evidence sought to be proved by the prosecution was limited only to serviceability of an ordinary revolver, Mr Cheong (PW6), a chemist in the chemistry department, was competent to give expert evidence of such an uncomplicated matter. In the circumstances of this case, the court was entitled to accept his position as a government chemist as sufficient, without going into his academic qualification or experience, although for the sake of completeness it is desirable to do so. Therefore, the last ground of appeal must equally be rejected.

For the above reasons the appeal was dismissed, the conviction was upheld and the death sentence affirmed.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim
